Supreme Court, U.S.
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No. 01-807

In the

Supreme Court of the United States

PHEASANT BRIDGE CORP.,

Petitioner,

v.

THE TOWNSHIP OF WARREN,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of New Jersey

REPLY TO BRIEF IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Does a land use regulation that does not bear any real and substantial relationship to the ostensible purposes of zoning, as applied to a particular property, fail to substantially advance a legitimate state interest as to that property and thus constitute a taking of that property so as to require the payment of just compensation under the Takings Clause of the Fifth Amendment, without regard to the economic impact of the regulation?
2. Is a property owner entitled to just compensation under the Takings Clause of the Fifth Amendment for a temporary taking of property between the enactment of a land use regulation and a subsequent judicial declaration that, as applied to such property, it fails to substantially advance legitimate state interests?

PARTIES TO THE PROCEEDINGS

Petitioner is a nongovernmental corporation. The corporate disclosure statement required by Rule 29.6 is contained in the Petition for Certification.

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Pheasant Bridge Corp. respectfully submits this brief pursuant to this Court's Rule 15.6 in reply to new matter contained in Respondent's Brief in Opposition.

A. THE LACK OF A FORMAL PROTEST AGAINST THE ADOPTION OF ORDINANCE 93-24 UNDER NEW JERSEY STATE LAW HAS NO BEARING UPON THIS MATTER.

Respondent's brief in opposition, without reference to the record, asserts that no protest against the adoption of Ordinance 93-24 pursuant to N.J.S.A. 40:55D-63 was filed and that the failure to pursue that "administrative" remedy renders the takings claim defective. Respondent, pp. 3, 14.[1]

That portion of N.J.S.A. 40:55D-63 which permits protests provides:

> A protest against any proposed amendment or revision of a zoning ordinance may be filed with the municipal clerk, signed by the owners of 20% or more of the area either (1) of the lots or land included in such proposed change, or (2) of the lots or land extending 200 feet in all directions therefrom inclusive of street space, whether within or without the municipality. Such amendment or revision shall not become effective following the filing of such protest except by the favorable vote of two-thirds of all the members of the governing body of the municipality.

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[1] Although respondent's statement is not supported by the record, petitioner acknowledges that it did not file such a protest and trusts that respondent will acknowledge that the vote which did adopt Ordinance 93-24 would have been sufficient to do so even if the protest were filed.

The opinion of the New Jersey Supreme Court notes that petitioner's property is 28.98 acres in area and that there are 778 "other" acres in the EP-250 zone. Pet. App. 2, 4. Thus petitioner's property constitutes less than $3^1/_3\%$ of the EP-250 zone and petitioner could not have filed an effective protest under that section.

Moreover, the protest provision merely enhances the majority required to support the adoption of legislation. Respondent does not explain how such an action could constitute an *administrative* remedy. Similarly, respondent suggests that petitioner could have petitioned respondent's planning board for relief from the regulations of the EP-250 zone.[2] Certainly petitioner could have asked the planning board to recommend that the governing body that the ordinance be amended (the planning board would have no authority itself to grant any relevant relief), but such relief would be in the form of legislation.

More fundamentally, respondent's argument on this point is muddled. Although respondent states that a ripeness inquiry under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), is distinct from the question of exhaustion of administrative remedies, respondent proceeds to argue that petitioner had administrative remedies in the form of the protest and request

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[2]For support of this proposition respondent cites *Feiler v. Fort Lee Bd. of Adjustment*, 240 N.J. Super. 250, 256-57 (App. Div. 1990), certif. denied 127 N.J. 325 (1991), but the connection between the proposition and the citation is obscure at best. In *Feiler* the municipality had adopted intentionally improper zoning for a tract in order to compel any developer to seek a "use" variance from the board of adjustment, a process by which the municipality could exert greater control over the development of the property. The *Feiler* court condemned such a scheme and stated: "The remedy for inappropriate zoning is legislative or judicial action." 240 N.J. Super. at 256.

for rezoning discussed above.[3] Respondent confuses *Williamson County*'s finality prong with the novel proposition that the government must be given an opportunity to "cure" the taking which would not be compensable until relief is refused by the legislature.[4]

B. *AGINS* NEITHER ARTICULATED A BALANCING TEST NOR INSULATED "TEMPORARY" PROPERTY RESTRICTIONS FROM A TAKINGS CLAIM.

Respondent characterizes this Court's opinion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), as having articulated a balancing test between the private and public interests there involved. Respondent, p. 9. Respondent does not further identify this supposed balancing test or describe its application in this case. Although it is true that this Court stated that the question of when a property has been taken "requires a weighing of private and public interests," [447 U.S. at 261] the Court did not utilize that weighing process as the test for whether a taking had occurred. Rather, this Court determined that question based upon its earlier stated disjunctive test.[5] As it happened the ordinance in question did substantially advance legitimate governmental goals and because the California Supreme Court determined that the appellants there could develop their five acre property with as many as five houses, the ordinance did not facially deprive the

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[3]As noted in the Petition, the New Jersey courts ruled that petitioner had no administrative remedy to exhaust. Pet. 17, n. 5.

[4]In this case respondent's governing body had ample opportunity to afford petitioner relief from the EP-250 zone provisions of Ordinance 93-24 but has yet to do so.

[5]"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land, ..." 447 U.S. at 260, citations omitted.

owners of economically viable use. Accordingly, that ordinance was found not to be a taking.

Respondent also cites *Agins* for the proposition that "the course of normal land use regulatory activities may in fact result in temporary restrictions on a property owner's use of his property, which restrictions neither constitute a taking of the property, nor a deprivation of a recognized Constitutional right." Respondent, p. 10. Neither text nor pagination are cited in support of this statement. The *Agins* case did not involve temporary restrictions. Given the context of the discussion in respondent's brief, it could be that the respondent is confusing the burdens associated with the pendency of a later abandoned condemnation process[6] with the burdens imposed by unreasonable regulations subsequently invalidated.

C. *FIRST ENGLISH* DOES NOT ESTABLISH MUNICIPAL IMMUNITY FOR TEMPORARY REGULATIONS IN THE COURSE OF ESTABLISHING A VALID LAND USE SCHEME.

Another extraordinary statement contained in respondent's brief is the claim that *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), established municipal immunity from takings claims arising from temporary regulations.

> *First English* certainly acknowledges that municipal governments simply cannot be held liable for damages of any kind due to a

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[6]As this Court's opinion relates, the City of Tiburon had commenced condemnation proceedings, which were abandoned the next year. The appellants were reimbursed for their costs in that action. *Agins*, 447 U.S. at 257-58, n. 1. That situation should be distinguished from petitioner's situation where the unreasonable regulation was applied for seven years.

> temporary heightened development regulation which is enacted during the course of establishing a valid land use regulatory scheme, even when the heightened regulation is thereafter found to be unreasonable as to a particular property.

[Respondent, p. 13.]

As with the so-called *Agins* balancing test discussed above, respondent cites neither text nor pagination for this proposition. This deficiency is not surprising as *First English* dealt specifically with an "interim" regulation and held that the takings claim could proceed.

Even if *First English* did provide such immunity, respondent has not demonstrated how that principle would apply in this case. The EP-250 zone was not a temporary regulation while a more permanent zoning ordinance was crafted but was itself the result of a multi-year planning process. Respondent, pp. 1-3.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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